

Summary Minutes of the
Delta Protection Commission Meeting
Thursday, February 22, 2007

ADMINISTRATIVE AGENDA

1. Call to Order/Flag Salute

Chairman McGowan called the meeting to order at 6:45 p.m.

2. Roll Call

Present: Chairman McGowan, Commissioners Broddrick, Ferguson, Johnson, Johnston, Kelly, Nottoli, Perez, Ruhstaller, Sanders, Shaffer, Simonsen, van Loben Sels and Wolk.

Absent: Commissioners Cabaldon, Calone, Piepho, Reagan, Scriven and Wilson.

Chairman McGowan welcomed Assemblymember Lois Wolk, an ex-official member of the Commission and welcomed back Commissioner Broddrick.

3. Public Comment - Opportunity for Members of the Public to Address the Commission. Comments Also Welcome as Agenda Items are discussed.

No one addressed the Commission

CONSENT AGENDA (Items 4-9)

Commissioner van Loben Sels moved approval of the Consent Agenda; Commissioner Sanders seconded. The Consent Agenda was approved unanimously.

REGULAR AGENDA (Item 10)

Dan Siegel reported that the Commission held hearings in two sequential stages. The first stage was to determine if the Commission had jurisdiction over an appeal; if it determined that it had jurisdiction, then the second stage was to hear the merits of the appeal. He said the Commission has gone through both stages and determined that it had jurisdiction, and the purpose of the hearing tonight was not to review the merits, but to ensure that the staff findings are consistent with the merits determinations made at the last hearing. Additionally, no new evidence would be introduced, as any determinations would be based upon the existing record. Mr. Siegel said that since it was determined that the project was inconsistent with certain Policies of the Act and Plan, the project is stayed unless/until the inconsistencies are modified by the County and the project is resubmitted to the Commission. He said the Commission would then need to make written findings that the modified version is consistent with the Plan and County General Plan.

Mr. Siegel said the staff report provided analytical justifications for the determinations made at the last meeting. Further, the staff report was based on statements made by Commissioners, as well as oral and written testimony presented. He said that substantial evidence is required to back up the staff report. He also said that if it is found that there is information in the staff report not backed by substantial evidence in the record, that information should be removed from the report. Mr. Siegel further stated that any new evidence presented should not be part of the consideration.

Mr. Siegel reported that questions arose as to which Commissioners could vote. He said there were no restrictions on voting, and under certain circumstances Commissioners could vote without being present at the prior hearing, as long as the Commissioner was familiar with the record. He also reminded Commissioners that they must disclose ex-parte communications, however once the final determination is made by the Commission, then legally there would be no more prohibition on ex-parte communications.

Commissioner Nottoli reported that he received a call from the media, however, he did not take the call.

Commissioner Simonsen reported that he received a call from the media, however, he did not take the call.

Chairman McGowan reported that he received a call from the media, however, he did not take the call.

Commissioner Broddrick reported that he did not receive ex-parte communication; however, he was briefed on the project by former Commissioners Sandra Morey and Chuck Armor.

Commissioner Nottoli asked if the meeting was to determine the substance of the description for the findings on the policies. Mr. Siegel responded that the meeting was necessary to review the explanations as to why the determinations were made and if they were accurate and consistent with the determinations.

Commissioner Johnston asked how the Commission would review the project if it was remanded to the County, amended, and returned to the Commission for review. Mr. Siegel responded that it was best for the Commission to assume that the more specific the findings, the more likely to be bound if something comes back to the Commission.

Commissioner Johnston also asked if the reasons added to the determination are to give the basis for the action and to indicate to the County the remedies needed in order to meet the test of the law and Plan. Mr. Siegel said there are multiple purposes to the findings which include giving direction to the County, informing a Court how the Commission came to its determinations, and letting the public know what the Commission's analytical process was.

Commissioner Johnston asked Mr. Siegel would he advise the Commission how much discretion it had to evaluate an amended proposal against the decisions made at the prior meeting. Mr. Siegel responded that if an amended proposal were brought before the Commission, the Executive Director would work with the County to help bring the project into conformance with the findings and make a recommendation to the Commission as to whether or not the modified project was consistent with the Plan and Act.

Commissioner Johnston asked if a revised proposal would have a De novo hearing. Mr. Siegel responded yes.

Phil Pogledich, County of Yolo said that the County submitted two letters to the Commission; one from Supervisor Helen Thomson and the other from the County. He said the letters attempted to convey that adopting the findings was not the final step in the appeals; however it set the stage for the County to revise the project on remand to address concerns. He said the

findings failed to clearly express what the Commission is requiring as they did not discuss that the project is inconsistent with the three policies. He further said that the problems can and should be addressed before the findings are adopted by directing Commission staff to revise the findings to explain why. He said this should be based on Commission and not staff, interpretation. He also said that without basic information, the County lacks what it needs on remand to carry out its task effectively. Secondly, staff should revise the findings to eliminate all discussion of matters not decided by the Commission directly or indirectly on January 25, 2007, as the findings should reflect only what the Commission decided. He said that both letters highlight specific areas of concern, and other documents and testimony in the record should not substitute but only support the decision of the Commission on key issues of policy interpretation.

Mr. Pogledich said the County was concerned that the staff finding on the approved residential unit is not needed. He said he reviewed the tapes and transcripts of the hearing and the issue was not decided or discussed; therefore the Commission should remove that discussion from the proposed findings before adoption. He said the proposed findings have issues that should be properly addressed before remand to the County. Mr. Pogledich asked that the Commission return the findings to staff for appropriate revision and consider the revised findings at the earliest possible date at a future meeting.

Kari Fisher, Somach, Simmons and Dunn stated that the proposed findings are legally flawed because they contain post hoc rationalization. She said that regarding Land Use Policy P-3, the term density is not exclusive to residential density and when interpreting the word, the Commission must look to the law, especially, the Government Code governing local land use and the General Plan. Ms. Fisher said the proposed findings are misleading by using the Clarksburg General Plan as the basis for interpreting and applying density standards. She said the 1992 Clarksburg General Plan required to have population densities and building intensity standards for industrial uses as well as all other land uses, therefore, Commission staff could not lawfully highlight the lack of industrial/commercial density standards within the Clarksburg General Plan to manipulate the term density into a basis for arguing that density only applies to residential uses. She said that to limit density to residential use is flawed. She also said that with regard to Levees Policy P-3, the Commission did not specify or direct any particular conclusion regarding the interpretation of the terms density or increased flood protection, as the proposed findings exceed the Commission's directions and conclusions and ignore critical facts regarding the Commission's prior responsibility to review and approve the 2002 Clarksburg General Plan for consistency with the Act and Plan. Ms. Fisher said that since the Commission did not disapprove the Clarksburg General Plan it is presumed to be consistent with the Act and Plan.

Ms. Fisher said that the staff report regarding Land Use Policy P-4 contains factual errors because it references Zone B as having 100 year flood protection when it should be referenced to have 200 to 500 year flood protection. Furthermore, the findings are inconsistent with the requirements of law and they ignore critical facts regarding the Clarksburg General Plan. Ms. Fisher said the findings are not based on information discussed or considered by the Commission and are not supported by evidence in the record; therefore, they fail to properly support the Commission's decision and should not be included.

Ms. Fisher asked that the Commission revise the proposed findings to remove statements based on post hoc rationalizations and correct statements based on flawed legal analysis and correct facts. She offered an attachment of proposed findings.

James Pachl, Concerned Citizens of Clarksburg said that eight of the eleven issues decided by the Commission were in favor of the appellant and substantial evidence in the record supported the findings. He said the proposed findings and analysis accurately described the voting and deliberations at the January 25, 2007 hearing. He said the issue raised by Ms. Fisher regarding the County General Plan was wrong because it is not required for the Commission to automatically review each and every general plan submitted for approval.

Greg Loarie, EarthJustice, stated although EarthJustice disagreed with many of the Commission's findings at the January 25, 2007 meeting, it felt that the proposed findings are clear and accurately reflected the votes and deliberations. He stated that the record clearly supported the basis for the proposed findings on Land Use Policy P-3, Land Use Policy P-4 and Levees Policy P-3.

Chair McGowan convened the public hearing.

Russell van Loben Sels, Clarksburg said that the amount of growth should be addressed. He said that historically the annual growth rate for the town was less than 1 percent, the plan calls for 1.8 percent, and SACOG projections call for less than .5 percent, whereas the proposed project would amount to 120 percent. He also said that the County has only focused flood protection on the levee adjacent to the project and not the remaining 32.4 miles.

Ted Smith, Clarksburg, said that Clarksburg is not a dying town—it is alive with many activities, and there was no reason to build 164 homes.

Peggy Bohl, Clarksburg, said that the Concerned Citizens of Clarksburg and the Sacramento River Delta Alliance were in support of limiting urban development behind unsafe levees in the Primary Zone. She said both groups were satisfied with the conclusions in the staff report. She asked that the Commission follow the law as specified in Assembly Bill 797 and in the Act in order to protect and preserve the Delta.

Peter Simpson, Clarksburg, stated that it was the business of the Commission to enforce the Act. He also asked that Chair McGowan recuse himself from the issue, now and in the future, or abstain from voting on the matter.

Mark Wilson, Wilson Farms/Vineyards, stated that many people were living outside of the urban limits of Clarksburg and the population has gone down by two-thirds. He said the project was good for the residents and for agricultural business and the end of the Sugar Mill project would likely be the beginning of the end of the Commission if the project were not approved.

Chair McGowan closed the public hearing.

Commissioner Ruhstaller asked if staff would be willing to help the County make the project work. Ms. Fiack responded that staff would be available to work with County upon the County's request.

Commissioner Simonsen moved that the Commission adopt the findings and analysis set forth in the February 22, 2007 staff report, as modified in red by staff in tonight's handout. [The modification added one set of quotation marks, and the following language, to the portion of the first paragraph of LEVEES Policy 3: Basis of Finding that appears on the top of page 9 of that

report: Similarly, section 29765 lists findings that a local government must make where the Commission has adopted its resource management plan or amendments to that plan, but (1) a local government has not yet, pursuant to section 29763, submitted to the Commission general plan amendments that would bring their plans into conformity with the Commission's plan, or (2) a local government has submitted those amendments to the Commission, but the Commission has not approved the amendments. (The Commission adopted its resource management plan on February 23, 1995. It has only adopted one amendment; that amendment became operative on February 27, 1997.) Section 29765 findings include the following: “(f) The development will not expose the public to increased flood hazards.”] The findings and analysis explain the basis for the Commission’s determination that the Clarksburg Old Sugar Mill Specific Plan and related documents (OSMSP), as approved by the Yolo County Board of Supervisors (County) on October 24, 2006, are consistent or not consistent with the following policies of the Commission’s Land Use and Resource Management Plan for the Primary Zone of the Delta (Resource Management Plan) and related provisions in the Delta Protection Act (Act).

Consistent:

Agriculture Policy 4; Land Use Policy 2; Land Use Policy 7; Utilities and Infrastructure Policy 3; Levees Policy 1; Levees Policy 2; Levees Policy 4 and Levees Policy 5.

Not Consistent:

Land Use Policy 3; Land Use Policy 4; and Levees Policy 3.

Commissioner Shaffer seconded the motion. The motion was approved 12:1 by voice vote.

Commissioner Simonsen moved that the Commission remand the matter to the County for its reconsideration; Commissioner van Loben Sels seconded. The motion was approved unanimously.

11. Commissioner Comments/Announcements

Linda Fiack announced that the Delta Vision Blue Ribbon Task would meet March 1-2, 2007; the Stakeholder Committee would meet on March 5-6, 2007, and a workshop would convene in Suisun City on March 16, 2007.

12. Adjourn

The meeting was adjourned at 7:50 p.m.